90-418 (1)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

no.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

ESTHER GOLLNER, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WR T OF CERTIORARI

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BEST AVAILABLE COPY

1. Was Section 8338(a) of Title 5 United States Code unconstitutionally applied?

2. Did the United States Court of Appeals for the Federal Circuit (Court) sanctioned Merit System Protection Board's Order overlooking that MSPB procedure violates constitutional rights of property equity, redress of grievances, due process and double jeopardy protected by the Constitution?

3. Is there any nexus between the reluctance to reinstate and restore employee to civil service and thereby entitle employee to credit of further years toward retirement benefits and the functions of Office of Personnel Management, administratior of retirement benefits?

4. Why did the Court not accept enlargement of the record that will

facilitate the verification of misrepresentation and bad faith exercised in the handling of employee files at the United States Labor Department, Office of Worker's Compensation?

5. As OPM had constructive knowledge of the material facts from the beginning of adverse actions against petitioner, is their deception or at least gross negligence in processing her request for investigation and request for reinstatement a legal issue?

6. Is she entitled to compensatory damages represented in back pay and recovery of civil service benefits, equitable or legally binding or both?

7. Will the restoration of civil service benefits including retirement be a restitutionary or legal issue?

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (Court) 90-3103 MERIT SYSTEM PROTECTION BOARD (MSPB) SF 08-318 910 566 OFFICE OF PERSONNEL MANAGEMENT - CSA 3094 870, ORDER UNITED STATES POSTAL SERVICE (U.S.P.S.) SOCIAL SECURITY EMPLOYEE No. 571-62-7186 UNITED STATES DEPARTMENT OF LABOR, OFFICE: A13 - 369878, 8-8-71 AND A13 - 376828, 10-7-71

5. OPINIONS DELIVERED IN THE CASE

OPM'S Administrative determination, April 24, 1989, App p. 66:68 "You did not receive a refund of your contribution (to Civil Service Retirement Fund) The law that applies in your case is Section 8338 (a) of Title 5, United State Code. Because you were separated from United States Postal Service on March 4, 1972, ANY TIME AFTER THAT IN WHICH YOU RECEIVED BENEFITS FROM THE OFFICE OF WORKER'S COMPENSATION IS NOT CREDITABLE FOR CIVIL SERVICE ANNUITY BENEFITS, _ You have the right to appeal this decision to the Merit System Protection Board."

MSPB'S Initial decision, Sep. 13, 1989, App p. 61-62 "Under jurisdiction of 5 USC 8347 (d) Civil Service retirement denied as per 5 USC 8333 (a) because appellant has only 4 years, 4 months and

25 days since Oct. 10, 1967 to Feb. 19, 1972".

"Although I find the appellant's circumstances surrounding her REMOVAL FOLLOWING A COMPENSABLE INJURY to be compelling, the PROPERTY OF THE REMOVAL ACTION has no bearing on the appellant meeting the 5 years statutory requirements for entitlement to an annuity. App. p. 63-65

MSPB'S ORDER. _ Dec. 6, 1989

"Denying appellant's petition because doesn't meet criteria for review at 5 CFR 1201.115 .... Authorization to appeal under 5 USC 7703 (a)(1) App. p. 62

6. STATUS OF THE CASE

This request for Petition on Writ of Certiorari is timely submitted hereby, as per 28 USC Section 2101(c). The Court of Appeals denied request for

reconsideration of Judgement affirming the MSPB'S Order on 6-6-90 _ App. p. 1

The Affirmative Judgment, without opinion was issued on 5-9-90 and mandamus on 6-13-90

Denial for enlargement of the record was issued on 3-19-90 and denial for hearing on 4-18-90 App. p. 2 to ___

7. GROUND ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED

Petitioner respectfully submits to the Supreme Court of the United States a petition for Writ of Certiorary on the above captioned case because employer is in default of employees contract by appointment terms and employee fulfilled all the requiremnets by becoming non-probationary City Carrier. In addition, later, she went on to a probationary period as a Distribution Clerk; both

trainings were on teh job with government money.

The Court denied petitioners request for enlargement of the record, with evidences of enforced leave and duplication of payments by OWC (App. p. 53) that would have simplified reconsideration of issues that were not fully developed at MSPB level because respondent, OPM, declined to participate at the "Discovery" as at well as the scheduled hearing, which was later canceled Pet. Brief p. 22-23. The administrative Judge claimed lack of authority to enforce OPM responses as well as the designation of witnesses from U.S.P.O. and OWC, Resp.'s Brief, p. 14; but the Court had the power and neglected to use it.

The court consistently sanctioned the violation of Fifth Amendment's right of due process by denying a hearing that would have lead to establish the participation and responsibility of OPM on the wrongful removal of the employee and the subsequent denials for her reinstatement and restoration of her civil service benefits, including retirement.

> The Legislative History: Federal Employees Compensation Act of 1916 is the basis upon which the Federal Government compensates its employees when they are injured while in the performance of duty. Amendment of 1966 Section 6, Reemployment Rights, reads: Section 6 amends section 9 of the Act to provide that any employee receiving compensation be placed on any appropriate Civil Service register for certification for appointment to any vacant position for which he is physically and otherwise qualified, with the same priority in certification as the Commission now affords career or career conditional employees involuntarily displaced

through no fault of their own, USC, "Congressmen and Administrative News", 1966 p. 2433

The court completely denied the need to question respondent with reference to circumstantial evidences that could have lead to establish OPM's key participation in the misrepresentation of employee awards as full body disability, the only reason for which employee could be removed under the United States Law, the U.S.P.O.'s Postal Manual and the National Agreement with the Unions, current when the decision to separate her took place. Please see:

> Under the Postal Reorganization Act, approved August 12, 1970, Pub L 91-375, 84 Stat 719, which revised and reenacted title 39, United States Code, officers and employees of the Postal Service (other than the Governors) are covered by Civil Service Retirement System, 39 USC 1005(d). In addition, the Postal Service is granted authority, inter alia, to fix the compensation of benefits of its officers and

employees, 39 USC 1003(a) through collective bargining agreements, where applicable, 39 USC 1201-1209 - USC's Congressmen and Administrative News, 1974, p. 3696

The Court overlooked that, in a clear violation of Eighth Amendment against unusual punishment, assignments of heavy work were forced onto employee without previously testing her for endurance and stamina; that in spite of the recommendations made by family doctors, OWC'S orthopedic surgeon and U.S.P.S.'s medical officer that the employee be asigned light duties, she was intimidated, forced to take sick leave, disciplined, denied transfer to positions where heavy work was not needed and finally suspended on false charges and removed from work when she was working, when she was not fully disabled. Please see Pet. Brief p. 23, 24, 29, 30, in

violation of 29 CFR 1960.46 Allegation of Reprisal.

By affirming MSPB'S Order, the Court has sanctioned the application of a statute that did not consider wrongful removal or the policy of Congress to encourage capable handicapped people to continue employment, as per Section 501 of the Rehabilitation Act of 1973 (29 USC 791 as established by E.E.O. Commission in 29 CFR Part 1613.

Mandamus denied a remedy for adverse acts properly documented with overwhelming details presented by petitioner and not a single substantiation of its property by respondent, who only stated that employee was removed for cause without specification of the cause, in violation of Please see Resp. App. p. 9.

The judgment of the court without opinion violated the First Amendment's right to petition the government for redress of grievances.

Court's Mandamus on MSPB'S order denies common law principles which prevailed prior to the adoption of the Constitution in which violators were accountable for their acts and victims remedied; those law principles were acted on by Congress and became part of our legal system.

Appellant, though is not raising the protection clause of the Fourteenth Constitutional Amendment, with respect to discrimination on the basis of sex, national origin, injury because the court has requested her to abandon those claims as a condition to consider this case, as

per Pet.'s Brief p. f, discrimination claim.

Related Statutes Reaffirm This Right to Appeal

" Article 1 Section 10 - No State shall enter into law impairing the obligations of contracts"

" Article 14 Section 1 - No State shall deprive any person of life, liberty or property without due process of law."

" Article 6 Section 2 - State Courts judges are charged with the duty of following the Constitution of the United States.....

8. SUPREME COURT JURISDICTION TO REVIEW ON WRIT OF CERTIORARI.

Petitioner prays to this Supreme Court to grant review of this case on Writ of Certiorari because a) many issues need to be developed due to the defects

of MSPB's proceedings. "Discovery" was unilateral, the agencies refused to answer request for information and designation of witnesses, most important, OPM did not answer the motions to comply and did not participate at prehearing conferences or the hearing scheduled for 6-6-89. The hearing was replaced by a conference over the phone where transcripts of conversation before Petitioner read "Argument and Issues" were not recorded. b) Many issues had emerged at Court level for the first time with the appearance of OPM's Respondent's counsel. c) New information came into play that marks a step forward in clarifying the accountability of the agencies involved. There, Petitioner begs the authorization of this Supreme Court to consider the latest statements

of Mr. William J. Weagley, Representative, Office of Government Liason, U.S.P.O., reporting to a Congressional inquiry by U.S. Senator Alan Cranston.

Dated May, 8, 1990:

"Dear Senator Cranston: This is in response to your April 18 letter on behalf of Ms. Esther Gollner of Santa Barbara, concerning her interest in reinstatement to Postal Service Employment.

We Cannot add substantially to the information provided previously concerning Ms. Gollner. Certain former career employees are eligible to apply for reinstatement. However, there is no obligation to employ such an applicant as this is only one of several hiring sources. Approval or disapproval of reinstatement is within the authority of the appointing official. Applicants for reinstatement are considered and compared with others seeking the same position. Normally this entails review and assessment of available records, including reports from former supervisors. A decision is made based on the total assessment in relation to other available candidates and current employment needs. Enclosed is additional information reinstatement.

We are bringing Ms. Gollner's additional comments to the attention of our Employee Relations Department for review and response to Ms. Gollner's specific questions regarding her treatment as a Postal Service Employee. If I may be of further assistance, please let me know. Sincerely William J. Weagley. Enclosures."

Enclosures:

"Reinstatement in the Postal Service. Former Postal Service career employees and former career or career-conditional Federal employees may be reemployed or reinstated into Postal Service positions for which they qualify without having to compete in a Postal Service examination subject to the following time limits after separation:

Time Limits on Reinstatement. 1. Three year Limit: Former Postal Service career and former Federal employees who had competitive status and who are not entitled to veteran's preference, with less than three years of service, may be reinstated only within three years following the date of their separation.

2. Unlimited: There is no limit for reinstatement of former Postal Service career employees or former Federal employees who are entitled to veteran's preference, or who have completed three years of substantially continuous service, beginning and ending with a nontemporary appointment in the

> Postal career service of Federal competitive service.
>
> Appointing officials are not obligated to reinstate any applicant. They may fill vacancies by reinstatement, transfer, reassignment, promotion, change to lower level or by the new appointment of individuals who passed an entrance examination and have active eligibility on the appropriate hiring register.
>
> Those interested in reinstatement in the Postal Service should apply to the post officer of their choice. Postmasters, being responsible for the efficient operation of their office, select the best applicant for the employment they have to offer. They determine if vacancies will be filled at their office and how they will be filled. In the case of former employees who were removed for cause, higher level management approval must be given before the applicant may be reemployed in the Postal Service.

Even though Mr. Weagley failed to consider that the employee is a qualified handicapped person who should be required to meet only the minimum physical qualifications, the letter marks a progress in the issues of accountability

and that she has in addition, unlimitted reinstatement rights. Thus, still a dispute exists as to the interpretation of the plan provisions relating to eligibility of benefits. Writ of Certiorari is warranted because the Court had not made the needed interpretation of the plan provisions as they apply to this claim.

Back pay is not money directly owed by OPM, but money she could have earned if Civil Service Commission , now OPM, would have investigated properly the report of violations of U.S.P.S. and inquired on OWC misrepresentations as requested by employee. Money she could have earned if OPM had enforced her reinstatement.

Respondent's counsel, defending the interest of OPM, had suggested that

petitioner should sue U.S.P.S. directly and sue the Union for failure to represent her until exhaustion of grievance procedure. But, petitioner sees that no matter who is the respondent, the issues will remain the same and the nature of the relief sought will also remain the same.

> "Congress specifically characterizes back pay under Title VII as a form of "equitable" relief, 42 USC 2000 e-5(g) (1982 ed) 42 USC S 2000 e - 5(g). The court may order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay... or any other relief as the court deems appropriate".
>
> Under 29 USC S 160(c) where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization. See Abbemarle Paper Co. v. Moody, at 419, 45 L Ed 2d 280, 95 S Ct. 2362,

Writ of Certiorari, thus, is needed in order to establish OPM's failure to comply after employee claims and to act

after her request for reinstatement,. because the court should determine if she deserves restitutionary or equitable payment for the violation of her vested rights under contract or if the payments are legal entitlements under the law and by agreement with the Union.

(C)1 The Court of Appeals has used a standard of review on this case in a way that conflicts with applicable decisions and definitions given by this Supreme Court recently, "in which the decision challenge to nondiscretionary denial of benefits, and De Novo review held to apply to 29 USC S 1132 (a)(1)(B). According to opinion of the Supreme Court in Firestone Tire and Rubber Co.'s petitioners v. Richard Brush as follows:

> 489 U.S.__, 103 L Ed 2d 80, 109 S Ct. 87-1054, it was held (b) the law of trust must guide the determination of the appropriate standard of review

for actions under 29 USC S 1132 (a)(f), suits against plan adminstrators to remedy their lack of compliance with benefit plans.

(2) For purposes of Court of Appeals determination... because the 29 USC S 1027 language defining a "participant" as one who "is or may become eligible to receive a benefit" includes only employees in, or reasonably expected to be in, currently covered employment, or former employees who have a reasonable expectation of returning to covered employment or who have a coverable claim to vested benefits.

Trustee's power: 33, 36 .... the extent of a trustee's power concerning decisions affecting a trust is determined by a court's construction and interpretation of the trust agreement in light of all circumstances, without deference to either party's interpretation of the argument, where the agreement does not confer discretionary authority to trustee.

...Firestone argues that as a matter of trust law the interpretation of the terms of the plan is an inherent discretionary function... As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation. "The extent of the duties and power of a trustee is determined by the rules of law that are applicable to the situation

> ... The terms of trust created by written instruments are "determined by provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the setler with respect to the trust as is not admissable" id.
>
> The trust law de novo standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA" id.

Evidently, the issues in this case need to be remanded in order to consider issues that had emerged after MSPB's proceedings. Petitioner first needed to establish her wrongful removal and the misrepresentation of her injuries, now it becomes necessary to establish more clearly the accountability of OPM with respect to its participation and responsibility and to asses the remedy due.

Writ of Certiorari is needed in order to break the secrecy of the agencies

Lloyd La Follet Act, now 5 USC 7713,
guaranteeing non probationary employees continuing employment, absent cause for discharge, confers employee property interest; and under 5 USC Section 7501 which stipulates that "immediate relief from duty will be permitted only if the employee is continued in full pay status during the period necessary to effect suspension" Pet. App. p. 26

MSPB'S specific jurisdiction was invoked on vested rights on contractual annuity principles and on the specific areas of jurisdiction of the Board. --

A - (1) Reduction in grade or removal for unacceptable performance 5 USC 4303(e);
(6) Determination affecting the rights or interest of an individual under Civil Service Retirement System 5 USC 8347(d)(1)-(2);
(7) Disqualification of an applicant because suitability determination 5 CFR 731.401;
(10) Separation, reduction in grade because reduction in force (5 CFR 351.901).
(12) Failure to restore an absent employee to employment following partial recovery from compensable injury (5 CFR 353401 and B - (1) An appellate action involving discrimination under 5 USC 2302 (b)

involved. Judgment should be based on evidence, not on the lack of information and cooperation. The Court should have given less deference to OPM by perceiving the absence of feeling shown by agencies's officers, with not a slight regret for the wrong done and pity for the wronged.

9. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

The Court of Appeals specific jurisdiction was invoked under the provisions of the Civil Service Act, the Fourth and Fourteenth Amendment Rights on property, because they apply to vested rights on indefinite employment and retirement benefits as well as other benefits inherent to her civil service appointment.

(which was dropped later as a condition from the Court before accepting the case for review.) Pet. Brief p. 31

Federal questions sought to be reviewed were raised earlier on the Appeal to MSPB submitted on 5-22-89, by petitioner, under provisions of 5 USC 8151, as the following quotation shows, but they were ignored by MSPB and OPM.

> 7 - Appealed Action: Denial of benefits under Civil Service Retirement Law, Section 8338 (a) of Title 5, United States Code, etc., etc.
>
> 21 - Why do you think agency was wrong: I did not leave U.S.P.S. voluntarily. I had never recovered from the job caused injuries, the surgery advised to correct the spine broken disc was canceled and no supervised medical treatment was ever authorized. Request for light duty appointments, transfer, retraining, etc. were never answered.
>
> 22.- What action would you like the Board to take in this case?
>
> "Restoration for unjust removal. Shall regain the same seniority rights he/she would have if not separated Standing in the rolls shall be the same as if the employee had not been interrupted by separation".

23. - Indicate and explain why you believe you were discriminated against by the agency:

The injuries caused by arduous work and unsafe conditions at Chelli Track Terminal, Los Angeles, California 90052, depriving me the protection of provisions of 5 USC 8151, administered by the Office of Personnel Management.

OPM INVOLVEMENT IN THE CASE

Former Civil Service EEO protection was invoked as early as Jan. 1971 under 5 USC 2302. Although the discrimination claim on sex and national orgin was abandoned, it remains valid on account of adverse actions perpetrated against employee and the knowledge of the facts by the civil service authorities as precedent.

Open statements of claiment's testimony at hearing, EEO file 102-72, pointed out that adverse action of how unjust removal was not receiving protection of due process . (The entire

testimony of employee with chronological account of events is in MSPB file and references to it on Pet.'s Brief App. p. 35) EEO determined that the case became sour because a temporary compensation payment, (in which the first three days were deducted) was paid retroactively to employee on account of a 13-369878, date of injury 8-8-71, and made no reference to the areas of violations for which remedy was requested.

On April 9, 1973, petitioner appealed to the Board of Appeals and Review, U.S. Civil Service Commission (CSC) to review the administrative decision of EE O at U.S.P.S. level in a certified letter #254422, RRR. Page 2 reads:

> "Even with the omissions and misrepresentation of facts through the counselling, investigation and hearing, I believe that the evidence gave unquestionable support to my

allegation of discrimination in job classification, transfer, detailed assignments, light duty benefits, availability of working hours, compensation and reimbursement of wages, lay off, advance selection for promotion and training".

The CSC affirmed the decision of U.S.P.O. on Sept. 11, 1973 before acceptance of OWC of recommendation of Dr. Bailey on memorandum for the record dated 11-19-73 and before employee was wrongly awarded full body disability. The decision made only remarks to OWC's retroactive payments during employee suspensions with complete disregard to the Civil Service Act of 1883 and Amendments, specifically, section nine and added section 2 on 1947 as follows:

Sec. 2 on and after the enactment of this Act, any person with physical handicap who shall have served at least one year in the Postal Service and whose separation from the service is involuntary and without prejudice, shall adquire upon passing such suitable noncompetitive examination

as the Civil Service Commission shall prescribe, a classified civil service status.

CSC concluded that there had been no discrimination on sex, race or national origin and took no action to enforce reinstatement. The Union still could do nothing until the decision of the Board and when the Board awarded full body disability in a gross misrepresentation of the injuries the Union could not do anything either. Frustrated by not being able to find work because back injury was a liability that no insurance agency wanted to deal with, the petitioner requested the spine surgery. When she went for hospitalization, surgery and compensation were cancelled. Tired of waiting she discontinued the attorney and studied the OWC case herself. She found

that Dr. Bailey was clear, that she was prevented only from doing hard work.

On Aug. 22, 1977, a request for investigation of irregularities in the removal of employee was submitted in certified letter, to Mr. Alan Campbell, Commissioner, U.S. Civil Service Commission. The same letter was sent to the U.S.P.S., the U.S. Department of Labor, and the Unions.

This alluded letter gave a background and asked for remedies as follows:

> That as soon as possible I would like to have established:
> 1) The extent of permanent disability by an independent neurosurgeon of good reputation in the field;
> 2) the possibility of effective rehabilitation and reinstatement of my former position;
> 3) consideration of financial benefits for loss of income, and/or;
> 4) reinstatement in the Labor force as a handicap in a placement agency as the problem (with sequels of

> injuries) is chronic and needs a long treatment....
>
> I have been punished because I have been honest, independent, ambitious, educated, a steady worker and above all, because I am a woman.

No investigation took place. The letter was sent to OWC, reinstatement was never mentioned. In particular, the director of CSC's Bureau of Retirement, Insurance and Occupational Health, Mr. Thomas A. Timsley, on Sept. 20, 1977, responded by saying that he "referred the letter to the United States Department of Labor, Office of Worker's Compensation Programs in Washington, D.C., for consideration and further reply" and closed the subject. No investigation, no remedial action, no instruction in how to pursue reemployment.

U.S. Congressman Lagomarsino showed concern but, in spite of his inquiries, since 1977 to now, has been impossible to

obtain, from the U.S. Department of Labor: a) the full record; b) information on the reasons for full body disability payment; c) reasons for the cancelation of surgery; d) the lack of evaluation of employee's wage loss; e) the cancelation of medical benefits, including spine surgery. Direct requests from claiment has been either elluded or completely ignored.

5 USC S 8338 1980 Amendment Subsection(a) Pub. L96-499 provided that an employee was to be considered disabled only if the employee was found by OPM to be unable to render useful and efficient service in the employee's postion and was not qualified for reassignment to a vacant position in the agency at the same grade level and provided that an employee in the Postal Service was to be considered not qualified for such reassignment if such reassignment were to a position in a different craft or were inconsistent with the terms of the appropriate collective bargaining agreement.

But in the same year, 1980, petitioner's request for rehabilitation and placement through the U.S. Department of Labor was denied because U.S.P.O. stated that she was "terminated".

She did not know how to appeal, she was not given instructions so she went back to her job as a domestic, the only one she could find with her employment history of misconduct and full body disability.

On 1988, U.S.P.S. referred petitioner to OPM for her applications of retirement. She was sent two set of forms: 1) Immediate Retirement Benefits, 2) Disability Retirement Benefits. Here are some of the paragraphs from the instructions:

> OPM is required by Congress to review all vacant positions under its jurisdiction within the commuting

area of recovered employee and determine if employee meets the minimum qualification standards.

The purpose of this change and the administration enhancements is to encourage the retention of disabled employees in positions for which they are qualified to continue productive employment and to improve the integrity of the disability program....

Accommodation: Federal (ersound manual, chapter 306; Handbook of Reasonable Accommodations (PMS 720A) Handbook Job Analyses for Reasonable Accommodations (PMS 720B)

The agency's obligation to continue to try to reassign the employee does not cease with the filling of this certification. Your efforts should continue until your agency receives OPM'S decision on the application.

Please notice that OPM's determination p. 10 says "any time that in which you received benefits from the office of workers compensation is not creditable for civil service benefits" which is not in accordance with legislative history P.L 658 Civil Service Employees on Compensation rolls, U.S.

Code and Adminstrative News, 1970 p. 5934 et. e.g.

> "Although the retirement law stipulates that no credit may be allowed for periods of separation in excess of three days, it does provide that retirement credit shall be allowed for periods of leave - without pay during which an employee is receiving Federal Employee's Compensation Benefits as a result of a work - related illness or injury".

Here, it should be noticed that U.S.P.O. in agreement with the Union, left employee on the rolls, she was paid then for temporary disability under file A13-369878, date of injury 8-8-71 and her final separation was left pending arbitration of conflict of medical evaluations on the causes of her injuries because Dr. Nixon, U.S.P.S medical officer, suggested that the injuries were not caused by a "Clerk's" work. Her legal removal, consequently never took

place and her credit service is beyond 5 years.

Please notice also that OPM's respondent counsel opposed the enlargement of the records with exhibits of duplicated payments for the same part of the body under A 13-369878, date of injury 8-8-71 that was paid in year of 1972 and the same period, was paid after arbitration under A 13-376828 date of injury 10-7-71. Also notice that letter from petitioner to Chief Adjudication division, dated 12-21-88, Pet. Brief App. p. 14 refers to shortages of payments. Employee's repeated request for adjustment of salaries, was one of the reasons for management's punishments.

10. SUMMARY OF FACTS.

Employee was wrongfully removed because of her "whistle blowing" on

irregularities she observed, Pet. Brief p. 36,37.

U.S.P.S. did not process her request for reinstatement, when she was ready, willing and capable of working as a window clerk where Spanish was needed or any other position at level 5 which did not include interchangeable duties with mail handlers, Pet. Brief. p. 33.

O.P.M. did not enforce her reinstatement rights on a subterfuge that she received OWC payments.

O.P.M. did not offer to handicapped employee who had suffered a lower back compensable injury a job under civil service programs any Federal opening since 1972 to 1990.

Employee has reasonable expectations for reinstatement and restoration of civil service benefits. Employee, a

"Participant" of Retirement benefits, did not default the contract.

11. BASIS FOR FEDERAL JURISDICTION

Judicial review of this Federal administrative case was authorized by 5 USC 7703 after exhaustion of administrative system of appeals, but most properly, 5 USC 7703 applies in this case because it invloves involuntary separation in which the Civil Service Commission failed to enforce reinstatement of employee, Pet. Brief p. 31. Answering points (C) p. 14 of Respondent's Brief, Petitioner insist her that the decision of the U.S. Department of Labor under FECA was correct: employee injuries prevented her to perform hard work. Petitioner did not ask the Court to change this decision, nor did she ask MSPB either. What she

requested is information on the award of full body disability, why it was done, who ordered it, and why the records are not corrected.

Petitioner believes that a Writ of Certiorari is warranted because the Court has failed to resolve the issues for which jurisdiction of the Court was invoked. Petitioner did not challenge the Constitutionality of the statutes requiring five years of service for an employee to be entitled to an annuity; she objected that section 8338, on deferred annuity, does not consider the circumstances of her wrongful removal when she became handicapped only to perform hard work, because of a lower back occupational injury, she did not challenge either the recorded length of <u>active service</u> of form 2606 of the

Individual Retirement Record, Pet. Brief. p. 1,2, but she challenges the length of creditable service. She believes that mandatory separation provisions are not to be applied retroactively from Nov. 19, 1973, when arbitration of injuries became final by OWC. She believes that after arbitration the removal became invalid and she, since then, has been suspended, pending reinstatement. The law is clear, she only could be removed for malfeasance, felony or complete disability.

The issue here is a redetermination of employee status under civil service programs because she did not default the contract. She, even after the lower back occupational injury, remained capable, ready and able to work within the physical qualifications of the job she

applied, was hired, and trained to do, Pet. Brief p. 35.

The removal action, under code 346, said that she was "physically unable to perform the full duties of her position". What needs to be analyzed: The distribution clerk job description and requirements, to which employee became "Regular Unassigned", was radically eliminated or re-posted to adjust to reorganization and incorporation of the use of zip code and automation. Employees needed no more time to learn schemes to process the mail, the job needed strong workers able to pull or push sacks and pieces of mail on the conveyor belt, according to the zip code, Pet. Brief p. 34.

12. RELIEF SOUGHT - CONCLUSION.

By Writ of Certiorari, the Court should reconsider that:

U.S.P.S. had wrongfully removed employee from work and in violation of common law, legal law and public policies of the government, OPM failed to enforce employee's reinstatement as a qualified handicapped individual.

Whether remedy sought is legal or equitable, it extends to the action on which remedy is sought and retirement benefits are incident to her civil service indefinite employment until 62 years of age or the age limit presently extended by Congress.

By Writ of Certiorari the Court should reexamine the facts and consider that if the Civil Service E.E.O., back on 1971-73, would have investigated the

claims made by employee and enforced merit system standards instead of closing her complaint's case on the grounds that employee salaries were compensated by OWC's payments, she would have recieved wages and benefits, including opportunity for advancement from her employer and her automatic mandatory retirement would be greater.

But, under the present circumstances, if OPM enforces her rights for reinstatement at the U.S.P.O. now, because it was a wrong arbitrary action for which U.S.P.O. should be accountable, employee will recieve her legal entitlement of back pay from the employer. Either way, OPM is the right respondent and counsel objection on this subject is not proper.

Wherefore, Writ of Certiorari in order to reverse the judgment against petitioner is necessary to serve justice and to afford the relief to which she deems herself entitled and such other and further relief as the discretion of the Supreme Court sees just and proper.

Entered on August 2nd, 1990

Esther Gollner

ESTHER GOLLNER

Petitioner per se.

I AFFIRMATIVE JUDGEMENT MAY 9, 1990

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 90-3103

ESTHER GOLLNER, Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent,

JUDGMENT

ON APPEAL from the MERITS SYSTEMS PROTECTION BOARD

in CASE NO(S) SF08318910566

This CAUSE having been considered, it is ORDERED and ADJUDGED:

Per Curiam (NIES and PLAGER, Circuit Judges, and WILLIAMS,* Senior Judge).

Affirmed. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED MAY 9, 1990 Franacis X.Gindhart, Clerk

* Senior Judge Spencer Williams of the United States District Court for the Northern District of California, sitting by designation.

ISSUED AS A MANDATE: JUNE 13, 1990

II DENIAL FOR RECONSIDERATION JUNE 6, 1990

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT - 90-3107

ORDER

Before NIES, Circuit Judge, Plager, Circuit Judge, and Williams.

A petition for rehearing having been filed in this case, upon CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is denied.

The mandate will issue on June 13, 1990

Dated: June 6, 1990

FOR THE COURT, Francis X. Gindhart

Clerk.

cc: ESTHER GOLLNER

ODESSA P. JACKSON

Gollner V.OPM, 90-3103

(MSPB - SF08318910566

Note: This order has not been prepared for publication in a reporter.

III DENIAL FOR HEARING MARCH 19, 1990

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT - 90-3103

ESTHER GOLLNER, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent

Petitioner's Request for Hearing

RECEIVED: April. 16, 1990

FILED: April 16,1990

FRANCIS X. GINDHART, CLERK

Denied - No new evidence can be submitted in this appeal, but all issues properly raised will be considered.

For the Court: Diane Frye,

Chief Deputy Clerk 4-18-90

Filed: U.S. COURT OF APPEALS

FRANCIS X. GINDHART, CLERK

Note: Not prepared for publication in a report.

IV DENIAL TO ENLARGE THE RECORD JAN. 16, 1990

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 90-3103

ESTHER GOLLNER, Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ON MOTION

Before ARCHER, Circuit Judge.

ORDER

Esther Gollner moves "to enlarge the record." The office of Personnel Management opposes the motion.

Gollner submits a list of thirteen documents that she wishes to have included in the record. OPM states that eight of the documents were part of the administrative record before the Merit Systems Protection Board and five were not.

The record on appeal is comprised of the MSPB decisions and the pleadings, evidence and proceedings before the agency. Fed. R. App. P. 16(a). Hence, the court will not consider "new evidence" that was not presented to the MSPB.

Rockwell v. Department of Transportation, 789 F.2d 908, 913 (Fed. Cir. 1986). Accordingly, enclosures V, VI, VIII, IX, I, XI, XII, and XIII are already properly part of the record on appeal. If Gollner wishes to bring any of these documents to the attention of the court, she should include them in an appendix to her brief.* OPM states that enclosures I, II, III, IV, and VII were not part of the administrative record. Thus, they may not be included in the record on appeal or referred to in the briefs.

Upon consideration,

IT IS ORDERED THAT:

Gollner's motion "to enlarge the record" is denied in accordance with the discussion herein.

Date: MAR 19, 1990 Glenn L. Archer, Jr.
Circuit Judge

cc: Odessa P. Jackson, Esq.

Esther Gollner

FILED U.S. Court of Appeals for

The Federal Circuit, Mar. 19,1990

FRANCIS X. GINDHART, CLERK

*We note that Gollner's informal brief has already been filed. Accordingly, we grant permission to Gollner to include an appendix with her reply brief if she desires.

Note: This order has not been prepared for, publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record it is not citable as a precedent.

V MSPB's ORDER DEC. 5, 1989

UNITED STATES OF AMERICA

Merit Systems Protection Board

DOCKET NUMBER SF083189910566

(CSA 3 094 870)

ESTHER GOLLNER, Appellant

v.

OFFICE OF PERSONNEL MANAGEMENT, Agency.

Esther Gollner, Santa Barbara, California, pro se.

Connie E. Torrillo, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

Samuel W. Bogley, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on September 13, 1989, because it does not meet the criteria for review set forth at 5 C.F.R.

Section 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. Section 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdicition. See 5 U.S.C. Section 7703(a)(1). You must submit your request 1to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calender days after receipt of this order by your representative, if you have one, or

receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD: Robert E. Taylor

Clerk of the Board

Washington, D.C.

VI MSPB's INITIAL DECISION SEPT. 13, 1989

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

San Francisco Regional Office

Docket No. SF08318910566, Date Sep 13,1989

ESTHER GOLLNER, Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, Agency.

Esther Gollner, Santa Barbara, California, pro se.

Connie E. Torrillo, Washington, D.C., for the agency.

BEFORE

LuNell Anderson, Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant timely appealed an agency reconsideration decision which determined that she was not entitled to a retirement annuity. The Board has jurisdiction to consider this appeal under 5 U.S.C. Section 8347(d). For the reasons set forth below, thee agency decision is affirmed.

ANALYSIS AND FINDINGS

The appellant's application for a civil service retirement annuity was denied by the agency because she did not have 5 years of creditable civilian service as required by 5 U.S.C. Section 8333(a). The record shows that the appellant was employed by the United

States Postal Service from October 10, 1967 to February 19, 1971. To be eligible for an annuity under the Civil Service Retirement System, Subchapter III of Chapter 83, title 5, United States Code, an employee must complete at least 5 years of creditable civilian service. 5 U.S.C. 8333(a). See also Daniel v. Office of Personnel Management, 28 M.S.P.R. 10, 12 (1984). I find that the appellant has failed to show that she has 5 years of creditable Federal Service subject to the Civil Service Retirement Law. The record shows, and the appellant agrees that she has only 4 years, 4 months, and 25 days of creditable service.

The appellant submitted copies of correspondence she sent to the United States Postal Service and the Department of Labor beginning in 1971, regarding the

history of her injury and her attempt to get additional workmen's compensation and later, restoration to her position. It does not appear that her inquiries were acknowledged or answered by either of these agencies.

Although I find the appellant's circumstances surrounding her removal following a compensable injury to be compelling, the propriety of the removal action has no bearing on the appellant meeting the 5 years statutory requirement for entitlement to an annuity.

In summary, I find that the appellant has not met her burden of proof, by a preponderance of the evidence, that she is entitled to a retirement annuity. See Huskey v. Office of Personnel Management, 27 M.S.P.R. 363, 365 (1985), aff'd, 790 f.2d 92 (Fed. Cir. 1986).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:LuNell Anderson,

Administrative Judge

VII OPM's ADMINISTRATIVE DETERMINATION

APR. 24, 1989

CRR:SJM:tlf CSA 3 094 870

Esther Gollner

1305 Kenwood Road

Santa Barbara, CA 93109

Dear Ms. Gollner:

This is in reply to your December 21, 1988 request for reconsideration of the initial decision stating that you are not eligible for an annuity undeer the Civil Service Retirement (CSR) law.

BACKGROUND

According to your records, you performed a total of 4 years, 4 months, and 25 days of creditable Federal service. This total includes your service with the U.S. Postal Service from October 10, 1967 to March 4, 1972. A search of all available records does not indicate that you performed any additional Federal service. You have less than the necessary five years of creditable Federal service. The initial decision of December 5, 1988 correctly determined that you do not have title to an annuity but provided an incorrect reason for this finding.

Our initial decision erroneously denied your benefits because you received a refund of your retirement contributions. You did not receive a refund of your contributions. We did send $363.99 of your contributions to the Postal Data

Center in repayment of you debt to them due to overdrawn leave. Enclosed are copies of your retirement account records (SF 2806).

ANALYSIS AND FINDINGS

The Office of Personnel Management is charged with the administration of the Civil Service Retirement law and is expected to pay benefits only as provided by law. Also, we are obligated under law and regulation to correct any error(s) in payment of benefits. The law that applies in your case is: Section 8338(a) of title 5, United States Code which states in pertinent part: An employee who is separated from the service or transferred to a position in which he does not continue subject to this subchapter after completing 5 years of civilian service is

entitled to an annuity beginning at the age of 62 years.

We have determined that because you have less than the five years civilian service required by law, you are not eligible for an annuity under the CSR law.

Because you were separated from the U.S. Postal Service on March 4, 1972 any time after that in which you received benefits form the Office of Workers' Compensation is not creditable for civil service annuity benefits.

APPEAL RIGHTS

In view of the above, the decision of December 5, 1988, as amended to correct the reason for denial of your benefits, is affirmed. This constitutes the final decision of the Office of Personnel Management on this matter. You have the right to appeal this decision to the Merit

Systems Protection Board. The enclosed sheet provides filing instructions. Please note the twenty-five (25) day time limit for filing an appeal.

Sincerely,

William C. Jackson, Chief Reconsideration and Debt Colleciton Division.

Enclosures

cc: Honorable Robert J. Loagomarsino
Member, U.S. House of Representatives
Studio 121 El Paseo
814 State Street
Santa Barbara, CA 93101

cc: Lorenzo D. Stephens, Director
Human Relations Department
American Postal Workers Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005

CRR:SJM:tlf: disk 1: doc. 15: 4/10/89 draft, 4/12/89, 4/20/89 final

IN THE

SUPREME COURT OF THE UNITED STATES

no.

ESTHER GOLLNER, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

Proof of Service

Petitioner, Esther Gollner, does swear and declare that on this date, August 2nd, 1990, pursuant to Supreme Court Rules 29.3 and 29.4, has mailed three (3) copies each of Petition for Writ of Certiorari by certified mail to the addresses below;

Ms. Frances X. Dunghart, Clerk,
Certified, RRR 488 276 557P
United States Court of Appeals

for the Federal Court

717 Madison Place, N.W.

Washington, D.C. 20439

Phone: 202-633-6550

Ms. Odessa P. Jackson -

Certified RRR P 448 276 554

Department of Justice

Commercial Litigation Branch

Civil Division

550 11th Street, N.W. Room 9136

Washington, D.C.

Ph: 202-724-6289

Solicitor General -

Certified RRR P 488 276 555

Department of Justice

550 11th Street

Washington, D.C. 20530

And Forty (40) copies to:

Mr. Joseph F. Spaniol, Jr., Clerk,

Certified RRR P 488 276 556

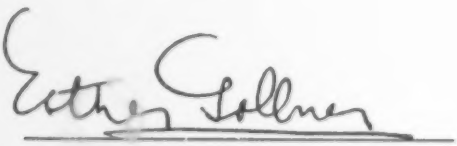
Supreme Court of the United States

1 First Street, N.E.

Washington, D.C. 20543

Ph (202) 479-3000

Thus, all parties to be serve have been served, in compliance with 28 U.S.C.1746



Esther Gollner,

Petitioner per se

1305 Kenwood Rd.

Santa Barbara, Ca. 93109

Messages: (805) 648-4704